

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

ZURICH AMERICAN)
INSURANCE COMPANY,)
)
Plaintiff,)
)
v.)
)
PATRIOT MODULAR, LLC and)
ELDECO PIPE AND FABRICATION,)
LLC,)
)
Defendants.)
_____)

Case No.: 1:22-cv-04377-JPB

**MEMORANDUM OF LAW IN SUPPORT OF ZURICH AMERICAN
INSURANCE COMPANY’S MOTION FOR SERVICE BY PUBLICATION
AS TO DEFENDANT PATRIOT MODULAR, LLC**

COMES NOW Zurich American Insurance Company (“Zurich”), Plaintiff herein, and, pursuant to Fed. R. Civ. P. 4(d)(1), files its Memorandum of Law in Support of Its Motion for Service of Defendant Patriot Modular, LLC by publication, and states as follows:

STATEMENT OF FACTS

This is an action for declaratory judgment pursuant to 28 U.S.C. § 2202 to determine and resolve questions of actual controversy involving a Commercial General Liability policy issued by Zurich to Defendant Eldeco Pipe and Fabrication,

LLC (“Eldeco”).¹ Eldeco was sued by Defendant Patriot Modular, LLC (“Patriot”) via a Fourth-Party Complaint, seeking indemnification for the claims asserted against Patriot in that case styled *IHI E& C International Corporation v. Robinson Mechanical Contractors, Inc. d/b/a Robinson Construction Company and Fidelity Deposit Company of Maryland*, Civil Action No. 1:19-cv-04137-JPB, United States District Court, Northern District of Georgia (the “Underlying Lawsuit”).

On November 2, 2022, Zurich filed its Complaint for Declaratory Judgment against Defendants Eldeco and Patriot, seeking a declaration that there is no coverage for either under the Policy for the claims asserted against each in the Underlying Lawsuit. Summonses were issued to each of these Defendants on the same day [ECF Nos. 2-3].

On November 7, 2022, counsel for Zurich enlisted Ancillary Legal Corporation (“Ancillary”), a private process server, to serve Defendant Patriot with the Summons and Complaint via its Registered Agent, Allen McKinney, at his registered address, 1018 Highway 80 West, Suite 508, Pooler, Georgia 31322. (Loomis Declaration ¶ 8).

On November 8, 2022, Ancillary notified counsel for Zurich that the process server was unable to serve Patriot’s Registered Agent at 1018 Highway 80 West,

¹ The Policy is in the record at ECF-1-1.

Suite 508, Pooler, Georgia 31322, as Patriot and/or its Registered Agent had moved three years prior and left no forwarding address. (Loomis Declaration ¶ 8). The Affidavit of Non-Service on Patriot is in the record at ECF-9.

On November 11, 2022, counsel for Zurich ran an internal skip trace search for Patriot, which provided a second Registered Agent for Patriot, Justin Kreft at 120 Bearle Street, Pasadena, Texas 77506. (Loomis Declaration ¶ 9).

On December 8, 2022, counsel for Zurich enlisted Ancillary again to serve Patriot with the Summons and Complaint via its Registered Agent on file with the Texas Secretary of State, Justin Kreft, at his address 120 Bearle Street, Pasadena, Texas 77506. (Loomis Declaration ¶ 9).

On December 13, 2022, Ancillary notified counsel for Zurich that the process server was unable to serve Patriot's Registered Agent at 120 Bearle Street, Pasadena, Texas 77506 because the business had closed down. (Loomis Declaration ¶ 10). The Affidavit of Non-Service is in the record at ECF-10.

Per the records of the Georgia Secretary of State, Corporations Division, Defendant Patriot was involuntarily or administratively dissolved, and its certificate of authority was revoked by the Office of the Secretary of State on August 26, 2019. (Loomis Declaration ¶ 16). It therefore appears that the limited partnership has failed

either to maintain a registered office or appoint a registered agent in this State, pursuant to O.C.G.A. § 14-9-104(g). *Id.*

On or about December 15, 2022, counsel for Zurich contacted the attorney representing Patriot in the Underlying Lawsuit, Michael P. DiOrio with the law firm Lewis, Brisbois, Bisgaard & Smith, LLP. Counsel for Zurich requested that Mr. DiOrio accept service of the Summons and Complaint on behalf of Patriot, but Mr. DiOrio advised he had not been retained to represent Patriot in any matters other than the Underlying Lawsuit and, therefore, was not authorized to accept service in this action. (Loomis Declaration ¶ 11).

Counsel for Patriot in the Underlying Lawsuit advised Zurich to contact Patriot's insurance coverage counsel, Ben Perkins with the law firm Oliver Maner, LLP. (Loomis Declaration ¶ 12).

On January 25, 2023, counsel for Zurich served Mr. Perkins with a Notice of Lawsuit, Request to Waive Service of a Summons, Waiver of Service of Summons form, and a copy of the Summons and Complaint for this action. (Letter to Ben Perkins, dated January 25, 2023, attached hereto as Exhibit "A").

Having received no response to its Request to Waive Service of a Summons within the provided thirty-day period, Plaintiff sent an email to Mr. Perkins on

February 14, 2023, reiterating its request that Mr. Perkins accept service of the Summons and Complaint on behalf of Patriot. (Loomis Declaration ¶ 14).

On February 22, 2023, Mr. Perkins responded to Zurich's attorney's email, advising that he had only been retained to represent Patriot in connection with "the Indian Harbor case," and was not authorized to accept service on behalf of Patriot in this case. Mr. Perkins advised he did not know the identity of Patriot's current Registered Agent, if any. (*See* emails between Ben Perkins and Luciana Aquino, attached hereto as Exhibit "B").

To date, Zurich has been unable to locate another address for Patriot and/or its Registered Agent where service of the Summons and Complaint in this matter can be effectuated. Zurich has a claim against Patriot since it is seeking indemnification from Zurich's insured, Eldeco. Zurich thus seeks the Court's permission to proceed with service of process upon Defendant Patriot Modular, LLC by publication.

ARGUMENT AND CITATION OF AUTHORITIES

Fed. R. Civ. P. 4(e)(1) provides that an individual may be served by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made ...". Per Georgia state law, when a defendant cannot, after due diligence, be

found within the state, or conceals himself to avoid service of the summons, a plaintiff may perfect service by publication upon the approval of the Court. O.C.G.A. § 9-11-4(e)(1). Per O.C.G.A. § 9-11-4(f)(1)(A) service by publication is permitted under certain conditions:

(A) General. When the person on whom service is to be made resides outside the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of the summons, and the fact shall appear, by affidavit, to the satisfaction of the judge or clerk of the court, and it shall appear, either by affidavit or by a verified complaint on file, that a claim exists against the defendant in respect to whom the service is to be made, and that he or she is a necessary or proper party to the action, the judge or clerk may grant an order that the service be made by the publication of summons, This Code section shall apply to all manner of civil actions, including those for divorce.

In this case, Zurich has attempted to serve Patriot via two of its Registered Agents at two separate addresses: 1018 Highway 80 West, Suite 508, Pooler, Georgia 31322 and 120 Bearle Street, Pasadena, Texas 77506. Neither of these locations were occupied by Patriot or any of its Registered Agents. Zurich has contacted two other law firms retained to represent Patriot in other matters, but neither was authorized to accept service on behalf of Patriot for this action. Furthermore, counsel for Patriot did not have any information regarding Patriot's current Registered Agent or any other address where service upon Patriot may be effectuated.

Additionally, Zurich has a claim against Patriot because it has sued Eldeco, Zurich's insured, seeking indemnification in the Underlying Lawsuit. As such, Patriot is a necessary party to this declaratory judgment action because it will be bound by the stare decisis effect of any coverage determinations made by this Court. *See Am. Safety Cas. Ins. Co. v. Condor Assocs., Ltd.*, 129 F.App'x 540, 542 (11th Cir. 2005); *Owners Ins. Co v. Bryant*, No. Civ.A. 305CV48CAR, 2006 WL 50488, at * 3 (M.D. Ga. Jan. 9, 2006). (Loomis Declaration ¶ 17).

CONCLUSION

For the reasons stated herein, Zurich should be allowed to proceed with service of process upon Defendant Patriot Modular, LLC by publication. A proposed Order regarding same is attached.

Respectfully submitted this 3rd day of March, 2023.

/s/ Kenan G. Loomis
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*Attorneys for Plaintiff Zurich
American Insurance Company*

CERTIFICATION: The above-signed counsel hereby certifies that this document was prepared in Times New Roman 14-point font and a 1.5 inch top margin in accordance with LR 5.1B, N.D.Ga.

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CERTIFICATE OF SERVICE

This is to certify that on March 3, 2023, I electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF ZURICH AMERICAN INSURANCE COMPANY’S MOTION FOR SERVICE BY PUBLICATION AS TO DEFENDANT PATRIOT MODULAR, LLC** with the Clerk of the Court using the CM/ECF system. I further hereby certify that I have also served a copy of the foregoing via U.S. Mail on Defendants Eldeco and Patriot as follows:

Eldeco Pipe and Fabrication, LLC
c/o Allen McKinney
5751 Augusta Road
Greenville, SC 29605

Patriot Modular, LLC
c/o Justin Kreft
120 Bearle Street
Pasadena, TX 77506

This 3rd day of March, 2023.

/s/ Kenan Loomis

Kenan G. Loomis
Georgia Bar No. 457865